SEP 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-381

LAMONT ATKINSON,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND THE COURT OF APPEALS OF NORTH CAROLINA

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INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved .. 6

Statement of the Case 6

Reasons for Granting the Writs ... 13

Conclusion 31

Appendix:

Judgment Dismissing Appeal Ex Mero Motu and Denying Petition for Discretionary Review (June 17, 1977) A1

North Carolina Court of Appeals' Judgment and Opinion (May 18, 1977) A3

TABLE OF AUTHORITIES

Blockburger v. United States, 284 U.S. 299 (1932) ... 13,14,21,23

Brady v. Maryland, 373 U.S. 83 (1963) 24,29,31

Brown v. Ohio, ____ U.S. ____, No. 75-6933, 45 U.S.L.W. 4697 (June 16, 1977).. 13,14,15,16,23

Fairman v. State, 425 P. 2d 342 (Nev. 1967) 21

Jackson v. State, 533 P. 2d 1 (Wyo. 1975) 22

Jason v. State, 9 Md. App. 102, 262 A. 2d 774 (1970) 23

Kukiis v. Commonwealth, 290 N. E. 2d 155 (Mass. 1972) 21

Parham v. State, 329 So. 2d 365 (Fla. App. 1976) 22

People v. Brown, 40 Ill. App. 3d 562, 352 N. E.2d 15 (1976) 22

People v. Lugo, 53 A. D. 2d 650, 384 N. Y. S. 2d 492 (1976) 22

People v. Martin, 398 Mich. 303, 247 N. W. 2d 303 (1976) 21

People v. Roberts, 254 P. 2d 501, 505 (Cal. 1953) 18

Pointer v. Texas, 380 U. S. 400 (1965) 24,27,28

State v. Allen, 292 A. 2d 167, 172 (Me. 1972) 19

State v. Duplain, 102 Ariz. 100, 425 P. 2d 570 (1967) 18

State v. Estevez, 232 Ga. 316, 206 S. E. 2d 475 (1974) 19

State v. Reed, 517 P. 2d 318 (Ore. App. 1973) 23

Thompson v. State, 290 N. E. 2d 724 (Ind. 1972) 19

United States v. Agurs, 427 U. S. 97 (1976) 24,29,31

United States v. Atkinson, 512 F. 2d 1235 (4th Cir. 1975)..... 18

United States v. Curry, 512 F. 2d 1299 (4th Cir.) cert. den. 423 U. S. 832 (1975) 18

United States v. Stevens, 521 F. 2d 334 (6th Cir. 1975) 18

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STATE OF NORTH CAROLINA,
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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND THE COURT OF APPEALS OF NORTH CAROLINA

The Petitioner, Lamont Atkinson, respectfully prays that writs of certiorari issue to review the judgment and order of the Supreme Court of North Carolina entered in this proceeding on June 13, 1977, denying the Petitioner's petition for discretionary review and dismissing the Petitioner's appeal, and to review the judgment and opinion of the Court of Appeals of North Carolina entered in this proceeding on May 18, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals of North Carolina is reported at _____ N.C. App. _____, 235 S.E. 2d 289 (1977), and is reproduced in the Appendix infra at A3 - A6. The judgment entered by the Supreme Court of North Carolina denying the Petitioner's petition for discretionary review and dismissing the Petitioner's appeal is reported at ____ N.C. _____, 235 S.E. 2d 784 (1977), and is reproduced in the Appendix infra at A1 - A2.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered June 13, 1977, and this petition for writs of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The Petitioner was brought to trial upon indictments alleging that he (1) unlawfully possessed with the intent to sell and deliver the controlled substance heroin, in violation of the North Carolina Control Substances Act, N.C.G.S. § 90-95(a)(1), and that he (2) unlawfully did sell

and deliver the controlled substance heroin to a named person, Johnnie L. Price, also in violation of the North Carolina Controlled Substances Act, N.C.G.S. § 90-95(a)(1). The Petitioner was convicted for the commission of each of the alleged offenses, and was sentenced to serve two consecutive terms of nine years imprisonment in punishment therefor. The evidence tending to support the Petitioner's convictions for the offenses of possession of heroin with intent to sell and deliver, and the sale and delivery of heroin, was identical, in that each of the charges was based on the alleged occurrence of a single sale or delivery of the controlled substance heroin, which transpired at a single point in time. The convictions and the two consecutive sentences of nine years imprisonment which were imposed on the Petitioner for the offenses of possession of heroin with intent to sell or deliver, and the sale and delivery of heroin, were based on proof of the sole and identical transaction involving that controlled substance.

At the Petitioner's trial, State's witness

Johnnie L. Price, a Drug Enforcement Administration agent, was allowed to testify, over the Petitioner's timely objections, concerning the denominations of and the number of bills of paper money, totalling approximately $6,000, which he allegedly transferred to the Petitioner in exchange for a quantity of heroin. Price was allowed to testify on the basis of his "present recollection refreshed" after he referred to a list which purportedly catalogued the denominations of, total number of, and the serial numbers of the $6,000 which he had allegedly given the Petitioner. That master list had been compiled from several original lists of the serial numbers and denominations of the money which had been prepared by a number of police officers and agents. Price had never checked the lists which had been prepared by the other persons for the accuracy of the data which they contained by making comparisons against the bills of money themselves. After the master list of data had been compiled by a secretary the original lists were destroyed and were not available at the Petitioner's trial.

From these facts and in this setting, the questions presented for review are:

1. Whether the convictions and consecutive prison sentences for the offenses of the possession of a controlled substance with intent to sell and deliver, and the sale and delivery of a controlled substance, violated the Petitioner's right to not be subjected to multiple punishment for the commission of a single offense, when the convictions for the two crimes were based on proof of a single transaction which occurred at a single point in time and involved the same controlled substance?

2. Whether the admission of material testimony from a State's witness, concerning his "present recollection" of the denominations of and the number of bills of paper money which he allegedly transferred to the Petitioner in exchange for a quantity of heroin, violated the Petitioner's rights to confront his accusing witnesses and to not be deprived of his liberty without due process of law, when that testifying witness had no independent knowledge of

the denominations and number of bills about which he testified, and when the original lists of paper on which that information had been recorded by numerous other police officers and agents, from which a "master list" of data was allegedly compiled by a secretary, had been destroyed by agents of the State and were unavailable at trial?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

United States Constitution, Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The Petitioner, Lamont Atkinson, was

convicted after trial by jury in the Superior Court of Wayne County, North Carolina, for the possession of a controlled substance with intent to sell and deliver, and for the sale and delivery of a controlled substance, in violation of the North Carolina Controlled Substances Act, N.C.G.S. § 90-95(a)(1). He was sentenced to serve a term of nine-years imprisonment following his conviction for the offense of the sale and delivery of a controlled substance, and, at the expiration of that sentence, to serve a consecutive term of nine-years imprisonment for his conviction for the offense of the possession of a controlled substance with the intent to sell and deliver. The Petitioner appealed his convictions and sentences to the North Carolina Court of Appeals, and that Court affirmed the judgment entered by the trial court in all respects. The Supreme Court of North Carolina denied the Petitioner's petition for discretionary review, and dismissed his appeal ex mero motu.

The evidence adduced at the Petitioner's trial tended to show that Drug Enforcement

Administration agent Johnnie L. Price purchased 26.7 grams of heroin from the Petitioner in exchange for $6,000 which had been supplied to Price by the Government. The heroin buy took place in the Petitioner's apartment on August 26, 1975. The testimony which was offered to prove both of the offenses of possession of heroin with intent to sell and deliver, and the sale and delivery of heroin, was limited exclusively to the single transaction whereby the Petitioner allegedly transferred the 26.7 grams of heroin to Price in exchange for the $6,000. The Petitioner was arrested for the commission of the alleged offenses on October 20 or 21, 1975.

Agent Price testified that the money which he used to purchase the heroin from the Petitioner was supplied to him by Special Agent Donald Ashton, a member of the United States Department of Justice, Drug Enforcement Administration. Price and four other drug enforcement agents and police officers each counted a portion of the money which Ashton had supplied, by recording the serial

numbers of the bills and noting their denominations. Each of the agents turned his list over to Price, who did not check the accuracy of those lists against the money itself. Price evidently did count the total amount of money supplied to him and found it to match the total amount indicated on all of the lists. The original lists prepared by Price and the four other persons were given to Price's secretary. The data contained on those lists was allegedly transcribed and compiled into a single master list by the secretary, according to denominations and serial numbers. The original lists were then destroyed.

At the Petitioner's trial, Price was allowed to refer to the master list typed by the secretary which contained the serial numbers and denominations of the $6,000, which had allegedly been supplied to Price and transferred to the Petitioner, in order to "refresh his recollection" as to the number of and denominations of the bills of money supplied to Price. Price's testimony was admitted over the Petitioner's timely objections.

Price testified, based on his present recollection and after consulting the master list, that he transferred to the Petitioner thirty $100 bills, approximately forty $50 bills and forty $20 bills. None of the other agents or officers who had prepared the original lists appeared in court to testify at the Petitioner's trial. All of the original lists containing the primary, or original data about which Price testified, had been destroyed prior to trial and were not available for the Petitioner's inspection at any time.

The Petitioner raised and argued his contention that his convictions and consecutive sentences for the possession of a controlled substance with intent to sell and deliver and for the sale and delivery of a controlled substance, were unlawful, and constituted the imposition of multiple punishment for the commission of a single offense, before the Court of Appeals of North Carolina and before the Supreme Court of North Carolina. The Petitioner objected to and excepted to the rulings and judgments of the trial court in

adjudging the Petitioner guilty of the charged offenses and sentencing him therefor. This issue was preserved as Defendant's Assignment of Error XV, p. 116 of the Record on Appeal submitted to the North Carolina Court of Appeals. The issue was briefed and presented to the North Carolina Court of Appeals as Question for Review XIII, p. 11 of the Defendant-Appellant's Brief. The Petitioner presented this issue in his Petition to the North Carolina Supreme Court for Discretionary Review of the Court of Appeals' Judgment at p. 1, Paragraph I of that Petition. He also presented this issue upon his appeal to the North Carolina Supreme Court at p. 1, Paragraph I of his Notice of Appeal to the North Carolina Supreme Court.

The Petitioner objected in timely fashion to the admission of the witness Price's testimony concerning the number and denominations of the bills of paper money which he had allegedly transferred to the Petitioner in exchange for the heroin. The Petitioner

preserved his objections, and the issues there involved, in his Exceptions numbers 2 - 5 and 7 - 13, found at pages 33, 35-36 of the Record on Appeal submitted to the North Carolina Court of Appeals. These Exceptions were grouped under Assignment of Error II, at p. 115 of the Record on Appeal submitted to the North Carolina Court of Appeals under the heading "To the Admission in Evidence Over the Objection of the Defendant of Testimony of the Witness Price as to the Serial Numbers of the Currency Allegedly Paid to the Defendant." This issue was preserved and briefed before the North Carolina Court of Appeals as Question for Review II, p. 3 of the Defendant-Appellant's Brief. The Petitioner presented this issue in his Petition to the North Carolina Supreme Court for Discretionary Review of the Court of Appeals' Judgment, at p. 10, Paragraph II of that Petition. He also presented this issue upon his appeal to the North Carolina Supreme Court at p. 2,

Paragraph II of his Notice of Appeal to the North Carolina Supreme Court.

REASONS FOR GRANTING THE WRITS

1. The writs should issue because the decisions of the state courts, in upholding the Petitioner's convictions and consecutive sentences for the offenses of the possession of a controlled substance with intent to sell and deliver, and the sale and delivery of a controlled substance, when both convictions and sentences were based on the same alleged transaction, occurring at a single point in time and involving the same controlled substance, are in conflict with this Court's decisions in Brown v. Ohio, ____U.S.____, No. 75-6933 (June 16, 1977) and Blockburger v. United States, 284 U.S. 299 (1932).

In Brown v. Ohio,_____U.S._____, No. 75-6933, 45 U.S.L.W. 4697, 4699 (June 16, 1977), the Court reiterated the test for determining whether two criminal offenses are sufficiently distinguishable to permit the imposition of cumulative punishment which was

first set forth in Blockburger v. United States, 284 U.S. 299, 304 (1932).

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . .

In Brown v. Ohio the Court determined that successive trials and convictions, and the imposition of cumulative punishments for the offenses of joyriding and auto theft, violated the defendant's Fifth and Fourteenth Amendment rights to be free from being twice placed in jeopardy for the same offense. The double jeopardy violation was extant even though the alleged offenses were based on acts which were separated by approximately ten days time. The constitutional violation was presented because

> The lesser offense -- joyriding -- requires no proof beyond that which is required for conviction of the greater -- auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.

Brown v. Ohio, supra, 45 U.S.L.W. at 4699.

The Petitioner's case is strictly analogous to the circumstance presented in Brown v. Ohio, supra. The offense of possession of a controlled substance with intent to sell or deliver requires no proof beyond that which is required for the sale or delivery of a controlled substance. It is apparent that one could not sell or deliver a controlled substance without first maintaining possession over the substance with the intent to sell or deliver it. The Petitioner's convictions and consecutive sentences, moreover, resulted from proof of but a single transaction -- a consideration of some significance to the dissenting Justices in Brown v. Ohio.

> It is possible, of course, that at some point the two acts

> would be so closely connected in time that the Double Jeopardy Clause would require treating them as one offense. This surely would be so with respect to the theft and any simultaneous unlawful operation.

Brown v. Ohio, supra, 45 U.S.L.W. at 4700 (Blackmun, J., dissenting)(emphasis added). For purposes of the Double Jeopardy Clause, and the proscription against imposing multiple punishment for the commission of a single offense, the offenses of the possession of a controlled substance with intent to sell and deliver, and the sale and delivery of a controlled substance, constituted the "same" offense. As the evidence adduced at the Petitioner's trial established that only a single transaction involving a controlled substance transpired, at one point in time, the Petitioner's convictions and the consecutive sentences imposed for the possession of a controlled substance with intent to sell and deliver, and the sale and delivery of a

controlled substance, violated the rights guaranteed the Petitioner under the Fifth and Fourteenth Amendments to the United States Constitution.

In addition to being inconsistent with the constitutional authority established by the United States Supreme Court, the decisions rendered by the North Carolina Court of Appeals and the North Carolina Supreme Court are out of line with the overwhelming authority of the federal and state courts which have addressed the issue of whether multiple punishments may be inflicted for the commission of two or more statutory offenses based upon proof of a single illicit drug transaction. Either as a matter of statutory construction, to avoid the constitutional issue involved, or as a matter of constitutional law, a number of the federal and state courts have invalidated multiple convictions or punishments based on separate statutory provisions but involving only a single controlled substance transaction.

See, e.g., United States v. Stevens, 521 F. 2d 334 (6th Cir. 1975); United States v. Atkinson, 512 F. 2d 1235 (4th Cir. 1975); United States v. Curry, 512 F. 2d 1299 (4th Cir.) cert. den., 423 U.S. 832 (1975)(all holding that there exists a merger of the offenses of the possession of heroin with intent to distribute, and the distribution of heroin, when the alleged offenses involved but a single illicit transaction, as a matter of statutory construction of 21 U.S.C. § 841 (a)(1), so that cumulative punishment of the accused for the two offenses could not stand); State v. Duplain, 102 Ariz. 100, 425 P. 2d 570 (1967)(en banc)(where defendant's possession of marijuana is a necessary incident to sale of the substance, he cannot be convicted for both possession and sale.); People v. Roberts, 254 P. 2d 501, 505 (Cal. 1953)(where possession and transportation of narcotics are merely incident to sale, convictions for possession and transportation of the drug must be reversed. "[C]o-operative

acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted."); State v. Estevez, 232 Ga. 316, 206 S.E. 2d 475 (1974)(where evidence required to convict defendant of illegal sale was the only evidence showing possession of controlled substance, defendant's conviction for illegal possession violated double jeopardy provision prohibiting multiple convictions, where one crime is included, as a matter of fact, within the other); Thompson v. State, 290 N.E. 2d 724 (Ind. 1972)(proscription against inflicting double punishment for a single offense prohibits defendant charged with both possession and sale of dangerous drugs arising from one set of operative circumstances from being convicted of both offenses.); State v. Allen, 292 A. 2d 167, 172 (Me. 1972)("We do recognize that certain proven facts may constitute a violation of two different statutes or of two distinct provisions of the same statute. . . . When

the same acts constitute two offenses, but these acts are such that the person may commit either offense without committing the other, the offenses are different though the acts be the same and the perpetrator may be punished twice, once for each offense. . . . It is elementary that the State cannot divide a single offense into several parts according to time and conduct and base separate prosecutions upon and impose separate punishments for the various necessary division of that single crime. . . . The possession of narcotic drugs is an offense distinct from the sale thereof. But in the instant case the possession and sale clearly constituted one single and same act. The possession, as legally defined, is necessarily a constituent part of the sale, as legally defined. Where the only possession of the narcotic drug is that incident to and necessary for the sale thereof, and it does not appear that there was possession before or after and apart from such sale, the State

cannot fragment the accused's involvement into separate and distinct acts or transactions to obtain multiple convictions, and separate convictions under such circumstances will not stand." (cites omitted)); Kuklis v. Commonwealth, 290 N.E.2d 155 (Mass. 1972)(As defendant's convictions for possession of marijuana and possession of marijuana with intent to sell involved the same time, place and type of drugs, they were duplicitous and obtained in violation of double jeopardy standards set forth in Blockburger v. United States, 284 U.S. 299 (1932)); People v. Martin, 398 Mich. 303, 247 N.W.2d 303 (1976)(defendant's convictions for both unlawful delivery of heroin and of possession of heroin, where possession constituted a necessary incident to the very delivery for which the defendant was also convicted, violated constitutional prohibition against imposing multiple punishment for the same crime.); Fairman v. State, 425 P.2d 342 (Nev. 1967)(defendant's convictions

for both sale and possession of marijuana arising out of identical transaction were unlawful.); People v. Lugo, 53 A. D. 2d 650, 384 N. Y. S. 2d 492 (1976)(defendant could not lawfully be convicted for sale and possession of dangerous drug where he could not have committed the unlawful sale of the drug without also having committed the offense of unlawful possession of the drug.); Jackson v. State, 533 P. 2d 1(Wyo. 1975)(where charges of possession of controlled substance with intent to deliver and delivery of controlled substance were based on same factual situation, defendant could not be convicted on both counts.). Cf. Parham v. State, 329 So. 2d 365 (Fla. App. 1976)(Convictions for possession of controlled substance and possession of prescription drug without prescription, when same substance is involved, are unlawful.); People v. Brown, 40 Ill. App. 3d 562, 352 N. E. 2d 15 (1976) (defendant's conviction for conspiracy to deliver cannabis unlawful where charge arose

from same conduct which constituted basis of his conviction for delivery of cannabis.); Jason v. State, 9 Md. App. 102, 262 A. 2d 774 (1970)(unlawful to convict defendant of possession of narcotic drug and of having the same drug in his control.); State v. Reed, 517 P. 2d 318 (Ore. App. 1973)(defendant cannot lawfully be convicted of conspiring to sell heroin and possessing heroin where the criminal activity and the conspiracy involved the same heroin.).

In order to bring the judgments rendered by the Court of Appeals of North Carolina and the Supreme Court of North Carolina into line with the authority established by this Court in Brown v. Ohio, ____U.S.____, No. 75-6933 (June 16, 1977) and Blockburger v. United States, 284 U.S. 299 (1932), and with the authority of the federal and state courts as above set forth, and to correct the serious violations of the Petitioner's constitutional right to not be subjected to multiple

punishment for the commission of a single offense, this Court should issue its writs of certiorari.

2. The writs should issue to correct the decisions by the North Carolina Court of Appeals and the North Carolina Supreme Court, which upheld the trial court's determination that the testimony of the State's witness Johnnie L. Price concerning the serial numbers and denominations of bills of paper money which had allegedly been transferred to the Petitioner in exchange for a quantity of heroin was admissible into evidence at the Petitioner's trial, as those decisions were contrary to the principles of law set forth in Pointer v. Texas, 380 U.S. 400 (1965), United States v. Agurs, 427 U.S. 97 (1976) and Brady v. Maryland, 373 U.S. 83 (1963).

State's witness Johnnie Price was allowed to testify, over the Petitioner's timely objections, that he had given the Petitioner $6,000 in bills of paper money, in specific

numbers and denominations, in exchange for a substance which was later identified to be 26.7 grams of heroin. The witness Price testified based on his "present recollection refreshed," after he was allowed to consult a list which allegedly contained a cataloguing of the bills of paper money, by serial number and denomination, which Price allegedly transferred to the Petitioner. The Government had allegedly supplied $6,000 to Price so that he could make a heroin buy from the Petitioner. Price and four other police officers and drug enforcement agents each counted a portion of the alleged $6,000, by making lists, on separate pieces of paper, according to the denomination of each bill and each bill's serial number. These original lists were collected by Price, who did not verify their accuracy or authenticity by comparing the notations contained thereon to the actual bills of money. Price apparently did check to see whether the total sums of money reflected on each of the lists equalled

the amount which had allegedly been supplied to him. The original lists were given to a secretary, who allegedly compiled the data onto a single typewritten master list. The master list, typed by the secretary from the five individual lists given to her, four of which were not prepared by Price and which contained data about which Price had no personal knowledge, was the list to which Price was allowed to refer at the Petitioner's trial to "refresh his present recollection" about the numbers and denominations of the $6,000 in bills which he allegedly gave to the Petitioner. All of the original lists were destroyed and were not available at the Petitioner's trial. None of the persons, with the exception of Price, appeared to testify about the data allegedly contained on the original lists at the Petitioner's trial.

The Petitioner was denied the right to confront his accusing witnesses, as guaranteed him by the Sixth Amendment to the United States Constitution, made applicable to the

States through the Fourteenth Amendment in Pointer v. Texas, 380 U.S. 400 (1965), by the admission of testimony through the witness Price concerning the information about the bills of money which he allegedly transferred to the Petitioner, which had allegedly been gathered and supplied by other persons who did not testify at the Petitioner's trial and about which Price had no independent knowledge. The evidence concerning the number and the denominations of the bills which was admitted through Price's testimony was supplied by persons who were not present in court to be submitted to cross-examination and who were not under oath at the time which they allegedly supplied the data concerning the money which was transferred to the Petitioner. The agents and police officers who allegedly compiled the lists containing the denominations and serial numbersof the $6,000 which allegedly changed hands in this case were, in a very real sense, accusing witnesses against the Petitioner.

By allowing Price to testify from his "present recollection" about facts of which he had no independent personal knowledge, the courts of the State of North Carolina denied the Petitioner his right to confront his accusing witnesses, contrary to the mandate of Pointer v. Texas, supra, and in manifest denial of the rights guaranteed the Petitioner under the Sixth and Fourteenth Amendments to the United States Constitution.

The original lists compiled by the several police officers and agents, on which the primary data concerning the denominations and numbers of bills of money which were allegedly transferred to the Petitioner was contained, were destroyed while in the custody of Drug Enforcement Administration agent Price. The master list which was allegedly prepared from the original lists could not serve, of course, as an adequate substitute for the primary data which was gathered. The destruction of the original lists, on which was contained evidence of a material

nature, which might well have created a reasonable doubt about the Petitioner's guilt which did not otherwise exist, caused a violation of the Petitioner's right to not be deprived of his liberty without due process of law, as guaranteed him under the Fourteenth Amendment to the United States Constitution. The principles of law established in United States v. Agurs, 427 U.S. 97 (1976) and Brady v. Maryland, 373 U.S. 83 (1963) were contravened by allowing the Petitioner's convictions to stand following the destruction of the original and primary lists of information prior to the Petitioner's trial by a drug enforcement officer and an agent of the State of North Carolina. The original lists of serial numbers and denominations might have been used to impeach the credibility and veracity of the witness Price, and might have undermined the entirety of the State's case against the Petitioner by demonstrating a fundamental variance between the facts of

the undercover operation as testified to by the alleged buyer of the heroin, the witness Price, and the facts as portrayed by the data concerning the money which was contained on the original lists. The destruction of the material evidence contained on the original lists seriously prejudiced the Petitioner's ability to refute or to discredit the testimony of the witness Price, and deprived the Petitioner of his right to see, inspect and utilize material evidence which might have been determinative of his guilt or innocence. As such, the destruction by an agent of the State of the original lists containing the serial numbers and denominations of the bills of money which were allegedly transferred to the Petitioner in exchange for a quantity of heroin, caused a violation of the Petitioner's right to not be deprived of his liberty without due process of law. The affirmances of the Petitioner's convictions by the Court of Appeals of North Carolina and the Supreme

Court of North Carolina were contrary to this Court's decisions in United States v. Agurs and Brady v. Maryland, supra.

CONCLUSION

For the reasons above set forth, writs of certiorari should issue to review and reverse the judgments entered by the Court of Appeals of North Carolina and the Supreme Court of North Carolina.

Respectfully submitted, this the 9 day of September, 1977.

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NO. 162PC EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA)
)
)
v.)
)
LAMONT ATKINSON)

****

JUDGMENT DISMISSING APPEAL EX MERO MOTU AND DENYING PETITION FOR DISCRETIONARY REVIEW

(768SC883)

This matter came on to be considered upon notice of appeal from the North Carolina Court of Appeals pursuant to G. S. 7A-30 and a petition for discretionary review pursuant to G. S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference, this 13th day of June, 1977 that the petition for discretionary review be denied, that the appeal be dismissed ex mero motu, and that it be so certified to the North Carolina Court of Appeals to the intent that its decision be affirmed. Petition for stay of execution of

judgment was also denied.

It is considered and adjudged further that defendant do pay the costs incurred, to wit: the sum of NINETEEN DOLLARS ($19.00) and execution issue therefor.

Issued under my hand and the seal of the Supreme Court this 17th day of June, 1977.

/s/
John R. Morgan
Clerk of the Supreme Court
of North Carolina

No. 768SC883

NORTH CAROLINA COURT OF APPEALS

Filed: 18 May 1977

State of North Carolina	)	
	)	
v.	)	Wayne County
	)	Nos. 75CR12474
Lamont Atkinson	)	75CR12190

Appeal by defendant from Small, Judge. Judgment entered 27 May 1976 in Superior Court, Wayne County. Heard in the Court of Appeals 6 April 1977.

Defendant pled not guilty to charges of (1) felonious possession of heroin with intent to sell or deliver and (2) felonious sale or delivery of heroin, with two prior convictions for felonious possession of heroin.

The State's evidence tended to show that on 26 August 1975 undercover agents using marked money purchased 62 grams of heroin from the defendant at his apartment. Defendant presented no evidence, but stipulated that he had been convicted twice of possession of heroin. The jury found defendant

guilty of both the possession and sale charges.

At a pre-sentence hearing two law enforcement officials testified that defendant was a major heroin dealer. From judgment imposing consecutive sentences to imprisonment, defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca B. Bevacqua for the State.

Herbert B. Hulse for defendant appellant.

CLARK, Judge.

Defendant brings forward on appeal thirteen assignments of error. Assignments Nos. 1, 2, 4, 5, 6, 7, 9, and 10 all pertain to rulings on or charges about the evidence by the trial judge. We see no useful purpose in reciting the several relevant principles of the law of evidence. We have carefully examined these assignments and the arguments in support thereof, and we find no error.

Defendant's motion for nonsuit was properly overruled. See cases cited in 4

Strong, N.C. Index, Criminal Law § 104 (3d ed. 1976). The testimony of chemist Tomczak and agents Price, Ashton, and Thompson was sufficient to take the case to the jury.

Defendant's motion for continuance was denied, and we find no prejudicial error therein. State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964). There is nothing in the record to indicate that any pretrial publicity prevented defendant from obtaining an unbiased jury.

The evidence relative to defendant's drug dealings considered upon sentencing by the trial judge was not inadmissible as "rank hearsay" under State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962). The testimony of the officers was largely based upon information derived from personal contact with or investigation of the defendant and knowledge of his prior convictions for drug violations.

Defendant was not improperly given consecutive sentences for the charges

under G.S. 90-95 of possession with intent to sell and sale, even though the charges arose from one transaction. In State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973), the court held that possession and sale are separate offenses for which separate sentences are permissible. In construing G.S. 90-95, we decline to follow United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975) wherein a federal statute was construed.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

Report per Rule 30 (e).

FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

In the United States

INDEX

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Questions Presented 3

Statement of the Case 3

Argument 5

Conclusion 11

TABLE OF AUTHORITIES

Albertson v. Milland, 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 983 (1953) 8

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) 6, 7

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) 9

Brown v. Ohio, _____ U.S. _____, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) 7, 8

Huddleston v. Dwyer, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944) 8

Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975) 7

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 656 (1969) 6

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 9

State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974) 6, 7

State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973) 6

State v. Collins, 22 N.C. App. 590, 207 S.E.2d 278 (1974) *cert.* denied, 285 N.C. 760 9

State v. Peacock, 236 N.C. 137, 72 S.E.2d 612 (1952) 9
State v. Thornton, 283 N.C. 513, 196 S.E.2d 701 (1973) 6
United States v. Agurs, 472 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) 9

In The

Supreme Court of the United States

October Term, 1977

No. 77-381

LAMONT ATKINSON,
Petitioner
v.
STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH
CAROLINA AND THE NORTH CAROLINA
COURT OF APPEALS

BRIEF OF RESPONDENT,
STATE OF NORTH CAROLINA, IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the North Carolina Court of Appeals is reported at 33 N.C. App. 404, 235 S.E.2d 289 (1977). The judgement of the North Carolina Supreme Court dismissing the petitioner's appeal ex mero motu and denying his petition for discretionary review appears in 292 N.C. 730, 235 S.E.2d 784 (1977). A copy of the opinion of the North Carolina Court of Appeals and a copy of the North Carolina Supreme Court judgement are appended to the petition. (Pet. Br. A1-A6).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT V.

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb . . .

AMENDMENT VI.

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

AMENDMENT XIV.

> Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

General Statutes of North Carolina:

N.C.G.S. 90-95

Violations; Penalties. - (a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell, or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
(2) To create, sell or deliver, or possess with intent to sell or deliver a counterfeit controlled substance;
(3) To possess a controlled substance.

QUESTIONS PRESENTED

1. WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS THE CONVICTIONS OF AND CONSECUTIVE SENTENCES IMPOSED UPON THE PETITIONER FOR THE OFFENSES OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL IN VIOLATION OF N.C.G.S. 90-95(a)(1) AND THE SALE OF A CONTROLLED SUBSTANCE IN VIOLATION OF N.C.G.S. 90-95(a)(1), WHEN THE CONVICTIONS WERE BASED UPON PROOF OF THE SAME TRANSACTION.
2. WHETHER THE ADMISSION OF TESTIMONY FROM A PROSECUTION WITNESS REGARDING HIS PRESENT RECOLLECTION REFRESHED OF THE DENOMINATIONS OF AND THE NUMBER OF BILLS ALLEGEDLY TRANSFERRED TO THE PETITIONER IN EXCHANGE FOR A QUANTITY OF HEROIN VIOLATED THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT ACCUSING WITNESSES AND HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

STATEMENT OF THE CASE

Petitioner is currently in the custody of the North Carolina Department of Correction, serving the first of two consecutive nine-year sentences pursuant to judgements entered on May 27, 1976, by the Superior Court of Wayne County, North Carolina.

Atkinson was arrested on October 21, 1975. On October 27, 1975, he was indicted by the Wayne County Grand Jury

in two separate bills of indictment. Count I of the first indictment alleged that on or about the 26th day of August, 1975, Lamont Atkinson did unlawfully, wilfully and feloniously possess with intent to sell and deliver a controlled substance (heroin) in violation of the North Carolina Controlled Substances Act. Count I of the second indictment alleged that on or about the 26th day of August, 1975, Lamont Atkinson did unlawfully, wilfully and feloniously sell and deliver to Special Agent Johnnie L. Price a controlled substance (heroin) in violation of the North Carolina Controlled Substances Act. Count II of each indictment alleged that Lamont Atkinson had two prior convictions of felonious possession of heroin.

Petitioner was tried before a jury in May, 1976 and convicted of the felonies of possession of a controlled substance (heroin) with intent to sell and deliver and the sale and delivery of a controlled substance (heroin) in violation of N.C.G.S. 90-95(a)(1). Petitioner was sentenced to serve two nine-year terms in the State Prison, the nine-year sentence for possession with intent to sell to run at the expiration of the nine-year sentence imposed for the sale.

The Petitioner appealed his convictions and sentences to the North Carolina Court of Appeals. In an opinion filed May 18, 1977 and certified June 7, 1977, the North Carolina Court of Appeals affirmed Petitioner's convictions. Thereupon, Petitioner filed a Notice of Appeal with the Supreme Court of North Carolina and in the alternative, filed with that Court a Petition for Discretionary Review. By order of the Court in conference dated June 17, 1977, the Supreme Court of North Carolina dismissed the appeal ex mero motu and denied the Petition for Discretionary Review. Two of the bases for relief set forth by the Petitioner in his brief for the North Carolina Court of Appeals, in his Notice of Appeal to the Supreme Court of North Carolina and in his Petition to the North Carolina Supreme Court for Discretionary Review are the same two issues raised in the petition to this Honorable Court.

At Petitioner's trial, the State presented evidence tending to show that on August 26, 1975, Johnnie L. Price, Special Agent with the Drug Enforcement Administration of the United States Treasury Department went to the Goldsboro apartment of the Petitioner and purchased heroin from the Petitioner for the sum of $6000. Agent Price testified that he received the $6000 used to make the purchase from his supervisor, Special Agent Donald Ashton, and that the $6000 was made up of 30 one hundred dollar bills, approximately 40 fifty dollar bills and approximately 40 twenty dollar bills.

In testifying regarding the numbers and denominations of the money used to make the buy, Agent Price was allowed to refer to a typewritten list. Agent Price testified that the list was prepared by his secretary under his supervision from the original lists of serial numbers recorded by himself and other officers on August 26, 1975. Agent Price testified that he had asked four other officers to help him record the serial numbers of the $6000 because of the time involved. Agent Price testified that while he did not double check the serial numbers written by the others, he did count the money after the lists were made and matched the amounts of money with the amounts written on each person's list. Agent Price further testified that he could use the list to refresh his recollection of the number and denominations of the bills making up the $6000.

At no point in the trial did Agent Price testify as to any of the serial numbers on the list. Nor was any use made of the list except to refresh Price's memory of the number and denominations of the bills allegedly given to the Petitioner in exchange for the heroin.

ARGUMENT

1. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT DOES NOT BAR THE CONVICTIONS OF AND CUMULATIVE

SENTENCES IMPOSED UPON THE PETITIONER FOR THE OFFENSES OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL AND THE SALE OF A CONTROLLED SUBSTANCE IN VIOLATION OF N.C.G.S. 90-95(a)(1) WHEN THE CONVICTIONS WERE BASED UPON PROOF OF THE SAME TRANSACTION.

The Double Jeopardy Clause protects against multiple punishments for the same offense. NORTH CAROLINA v. PEARCE, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). When the same transaction constitutes a violation of two distinct statutory provisions, the applicable test for determining "whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." BLOCKBURGER v. UNITED STATES, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

The Supreme Court of North Carolina has held that the possession and the sale of a controlled substance are separate and distinct offenses and that one charged with both offenses may be convicted of both and sentenced to imprisonment for each. See STATE v. AIKEN, 286 N.C. 202, 209 S.E.2d 763 (1974); STATE v. THORNTON, 283 N.C. 513, 196 S.E.2d 701 (1973); STATE v. CAMERON, 283 N.C. 191, 195 S.E.2d 481 (1973). The Court in STATE v. CAMERON, supra, held these to be separate offenses because it found that under North Carolina law one may legally possess a controlled substance and still be convicted of the unlawful sale of that same controlled substance. Thus, under North Carolina law, an unlawful sale would not prove illegal possession. The *Cameron* Court also found that since the unlawful sale requires a specific act, proof of a sale involves an additional fact not required for possession. In reaffirming its decision in CAMERON, the Supreme Court in STATE v. AIKEN, supra at 206, stated

as follows:

> "As we pointed out in STATE v. CAMERON, supra, one may unlawfully sell a controlled substance which he lawfully possesses. Furthermore, the sale of a substance is the passage of title thereto and while usually the seller of a controlled substance has possession thereof, actual or constructive, it is not necessarily so as a matter of law. One may sell an article or substance which he does not possess. Quite obviously, one may possess an article or substance which he does not sell. Consequently, possession is not an element of sale and sale is not an element of possession."

However, one may not possess a substance with intent to deliver without having possession thereof. Therefore, possession is an element of possession with intent to deliver and an unauthorized possession is a lesser included offense of possession with intent to deliver. STATE v. AIKEN, supra.

Applying the BLOCKBURGER test, it is clear that Petitioner was convicted of and sentenced for two separate offenses. Under North Carolina law conviction for possession with intent to sell in violation of N.C.G.S. 90-95(a)(1) requires proof of possession, while a conviction for sale in violation of G.S. 90-95(a)(1) does not require proof of possession. Similarly, under North Carolina law, a conviction for sale requires proof of a specific act not required to be proven for a conviction of possession with intent to sell. The *BLOCKBURGER* test is satisfied if each of the crimes requires proof that the other does not, even though the proof offered substantially overlaps. *IANNELLI* v. UNITED STATES, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

The case of BROWN v. OHIO, _____ U.S. _____, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) on which Petitioner so heavily relies, involves obviously distinguishable

circumstances. Nathaniel Brown was convicted of auto theft following a prior conviction of joyriding involving the same car. In affirming the auto theft conviction, the Ohio Court of Appeals specifically held that joyriding was a lesser included offense of auto theft and that the two prosecutions involved the same offense. The BROWN Court, in applying the BLOCKBURGER test, relied on this finding and concluded that the two offenses of which Brown was convicted "as defined by the court constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause." BROWN v. OHIO, Id. at 2226.

The two statutory offenses of which Petitioner was convicted as defined by the North Carolina Supreme Court, do not constitute the "same offense" for purposes of double jeopardy. The construction of a state statute by the highest court of a state is binding on the federal courts. ALBERTSON v. MILLAND, 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 983 (1953); HUDDLESTON v. DWYER, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944).

The fact that other state courts or federal courts have examined different statutes and invalidated multiple convictions or punishments involving a single controlled substance transaction is not a sufficient reason to grant Petitioner's writ. "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the Court does not exceed its legislative authorization by imposing multiple punishments for the same offense." BROWN v. OHIO, supra at 2225.

2. THE ADMISSION OF TESTIMONY FROM A PROSECUTION WITNESS REGARDING HIS PRESENT RECOLLECTION REFRESHED OF THE DENOMINATIONS AND NUMBER OF BILLS ALLEGEDLY TRANSFERRED TO THE PETITIONER IN EXCHANGE FOR A QUANTITY OF HEROIN DID NOT VIOLATE

THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT ACCUSING WITNESSES AND HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

At Petitioner's trial, prosecution witness Agent Johnnie L. Price gave testimony regarding the number and denominations of bills allegedly used to purchase heroin from the Petitioner. In so testifying, Price was permitted to use a typewritten list to refresh his present recollection.

The use of notes to quicken the memory is well-recognized procedure in North Carolina, if the memorandum is one which has been made by the witness, or in his presence, or under his direction. STATE v. PEACOCK, 236 N.C. 137, 72 S.E.2d 612 (1952). If after reading the document, the witness is able to remember the events, he may give testimony about them. STATE v. COLLINS, 22 N.C. App. 590, 207 S.E.2d 278 (1974), *cert.* denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

On voir dire, Agent Price testified that the original handwritten lists of serial numbers were made by himself and four other officers in his presence and that these lists were then given by him to his secretary who typed the master list used at trial under his supervision. Agent Price testified that though he did not double check the serial numbers listed by the others, he did count the money after the serial numbers were taken, and the amounts of money matched the amounts written on each list. Agent Price further testified that he could use the list to refresh his recollection of the numbers and denominations of the bills making up the $6000.

Petitioner correctly points out that the Sixth Amendment right to confront accusing witnesses is applicable to the states through the Fourteenth Amendment. POINTER v. TEXAS, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). However, Petitioner's argument that the four officers who helped Agent Price compile the original lists were accusing witnesses whom he should

have been allowed to confront is without merit. No testimony whatsoever was presented regarding the serial numbers these officers wrote down. Agent Price testified only regarding the denominations and number of each denomination of the $6000, facts of which he clearly had independent personal knowledge after having counted the money himself. Petitioner's contention that the other officers were accusing witnesses is simply unsupported by the trial record.

Petitioner's contention that the destruction of the original lists violated his Fourteenth Amendment Due Process rights is similarly unsupported by the trial record as well as by the cases cited by Petitioner. In BRADY v. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Court remanded for a new determination of punishment because the prosecutor had suppressed a confession of a co-conspirator at the trial of the defendant. In UNITED STATES v. AGURS, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court held that nondisclosure by the prosecutor of evidence of the victim's criminal record at the time of the defendant's trial did not violate the defendant's due process rights. The Court found that the omitted evidence would not have created a reasonable doubt of guilt that did not otherwise exist and therefore, no constitutional error had been committed.

In Petitioner's case, the record reveals no attempt to introduce evidence of the serial numbers on the list or to show that bills with these serial numbers (or any other bills) were found in the possession of Petitioner. Petitioner was tried for and found guilty of the possession of heroin with intent to sell and the sale of heroin, not for the possession of certain bills. Petitioner's guilt of the sale depended on whether or not he received money from Agent Price in exchange for heroin. Petitioner's guilt did not depend on whether he received a certain number of twenty or fifty dollar bills. While discrepancies between the amounts recorded on the original list and Agent Price's

testimony might have been used to show that Agent Price was somewhat careless in recording the numbers, such discrepancies would not have created any reasonable doubt about the veracity of Agent Price's testimony that he did, in fact, give money to the Petitioner. Thus, the original lists contained no material evidence determinative of Petitioner's guilt or innocence and their destruction cannot be viewed as a deprivation of Petitioner's constitutional rights.

CONCLUSION

From the arguments set forth above, it conclusively appears that Petitioner has raised no issue justifying further consideration of his case by this Court. The decisions of the North Carolina Court of Appeals and the North Carolina Supreme Court were decided in accordance with the applicable decisions of this Court, and Petitioner has failed to show any legal wrong amounting to an infringement of his constitutional rights. Therefore, a writ of certiorari should not be issued in this case.

This day of November, 1977.

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